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No. 89-1118

In the
Supreme Court of the United States

OCTOBER TERM, 1989

NEW LIFE BAPTIST CHURCH ACADEMY, ET AL.,
PETITIONERS,

v.

TOWN OF EAST LONGMEADOW, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for the Respondents in Opposition

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Questions Presented

1. Whether certiorari is warranted to review a case involving state regulation of a private religious school under the Free Exercise and Establishment Clauses of the First Amendment, where the court of appeals fully applied the traditional standards for First Amendment review consistent with a large and uniform body of law in the federal and state lower courts.

2. Whether certiorari is warranted to review the claim, not raised below, that the procedures of a local school committee for private school approval are unconstitutionally discretionary where those procedures implement objective standards for approval, the constitutionality of which has already been considered and upheld, set forth in the state's compulsory education statute.

3. Whether the court of appeals properly exercised its appellate authority in reviewing the findings of the district court.

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Opinions Below

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 885 F.2d 940. The district court issued three decisions. The first, not included to Petitioner's Appendix is reported, *sub nom. Braintree Baptist Temple* v. *Holbrook Public Schools,* at 616 F.Supp. 81. The district court decisions appealed from (Pet.App. 51a-169a, and 170a-178a) are reported at 666 F.Supp. 293 and 718 F.Supp. 2.

Jurisdiction

The judgment of the court of appeals was entered on September 7, 1989, and rehearing was denied on October 13, 1989. The petition for a writ of certiorari was filed on January 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statement

1. The Massachusetts General Laws ("M.G.L.") require all school age children to attend school. M.G.L. c. 76, § 2.[1] Pursuant to M.G.L. c. 76, § 1, to fulfill this requirement, children may attend a "public day school" in the town where they reside or "some other day school approved by the school committee" of the town where they reside. The school committee must approve a private school "when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town. . . ." However, the statute requires that the school committee "shall not withhold such approval on account of religious teaching. . . ." *Id.* M.G.L. c. 71, § 1, requires that schools employ teachers of "competent ability" and defines the required studies to include orthography, reading, writing, English, grammar, geography, arithmetic, drawing, music, the history and Constitution of the United States, the duties of citizenship, health education, physical education and good behavior.

[1] Chapter 76, § 2, provides a criminal penalty for truancy. Government officials also have the option of enforcing M.G.L. c. 76, § 1, through a civil care and protection petition pursuant to M.G.L. c. 119. The remedies under this provision could include a court order compelling education or even removal of the children from their parents' care. See *Care and Protection of Charles*, 399 Mass. 324, 329-331, 504 N.E.2d 592 (1987).

2. The petitioner New Life Baptist Church Academy ("New Life") is a private school founded in 1981 by the New Life Baptist Church, a Fundamentalist Baptist Church located in East Longmeadow, Massachusetts, to provide secular and religious education aimed primarily at "born again Christians" who share certain fundamentalist religious beliefs. Pet.App. 8a, 61a-62a. New Life believes that God is the sovereign and final authority in all human conduct and that, therefore, to submit their educational ministry to the prior or continued approval of secular authority would violate the sovereignty of Christ over his church and would, therefore, be a sin. Pet.App. 8a, 62a-63a.

New Life opened its school in 1981 without notifying the Respondent Town of East Longmeadow School Committee ("School Committee") or seeking approval. After being contacted by the Superintendent of the East Longmeadow public schools in 1982 with requests for information, New Life eventually indicated that it did not desire approval by the School Committee, but was willing to provide the information requested. Pet.App. 63a-67a. After the School Committee requested further information in early 1983, petitioners filed this lawsuit in federal district court in March, 1983. New Life so informed the School Committee by letter, but welcomed School Committee officials to visit the school anytime. Pet.App. 66a-70a.

3. The proposed procedure developed by the School Committee for use in determining whether the education provided at New Life complies with statutory requirements has been modified several times to accommodate New Life. Pet.App. 6a. As summarized by the court of appeals (Pet.App. 7a) and the district court (Pet.App. 71a-73a), the proposed process is as follows:

(a) Obtain information about the school's pupils, texts, daily class schedules, hours and days taught, compliance with health and safety rules, and curricula for each grade and subject.

(b) Examine the academic qualifications of faculty members.[2]

(c) Visit the school once, to meet with the administrator and to obtain a first-hand impression of teaching methods, instructional materials, and curricula.

(d) If the teachers lack adequate academic credentials, visit the school additional times to observe classroom teaching.

(e) Make suggestions for correcting deficiencies in the school's educational program (if any).[3]

If approval of a school program is obtained, the School Committee would review its compliance every two years, through written communications. If approval were denied, the school would be given a chance to improve and have approval reconsidered if it so desired. As a further accommodation to New Life, the School Committee agreed to forego a formal request for approval and conduct its own approval examination if New Life would simply submit factual information. Pet.App. 7a-8a.

4. With respect to these requirements of the School Committee, and of secular authority generally, as summarized by the court of appeals (Pet.App. 9a-10a) and the district court (Pet.App. 73a-81a), New Life has no objection to:

(a) complying with state health, safety and zoning rules;

(b) being incorporated under Massachusetts law;

(c) supplying the information required by the School Committee about the number of its students, the number of hours

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[2] The School Committee proposed to require that all teachers have college degrees, but intended to allow the school to employ some teachers who were studying for college degrees, but had not yet obtained them. Pet.App. 72a. The district court ruled that, under *Care and Protection of Charles, supra*, a college degree requirement was not permitted under Massachusetts law. Pet.App. 55a-56a. That ruling was not directly in contention on appeal.

[3] Further observation of teachers who lacked credentials and advice in furtherance of approval were intended by the School Committee to assist schools which would otherwise not be approved. See Pet.App. 49a, 72a-73a.

and days taught, the curriculum, texts, the number of teachers, and the criteria for hiring teachers;

(d) permitting School Committee officials to visit New Life occasionally to meet administrators and teachers, to read texts, and to observe classes;

(e) teaching the subjects required by state law, and holding classes the number of days required by state law;

(f) hiring teachers with adequate credentials, although, to the extent it indicates New Life's compliance with an approval requirement, they will not comply with requirements regarding specific teachers.

New Life does object, however, to any form of governmental approval of its educational program and to any procedure which is aimed at gaining such governmental approval. Therefore, New Life asserted, as to items (c) through (f), the specific requirements of the School Committee, that, although it does not object to the substance of those requirements, it would not meet those requirements since it cannot permit the School Committee any form of approval. Pet.App. 9a-10a, 73a-74a, 81a.

Because of these religious objections, New Life at trial proposed an alternative which permitted the School Committee no direct review and no approval at all of the educational program at the school itself. New Life asserted that it would have no objection if its students voluntarily submitted to standardized tests and if their parents voluntarily submitted their children's test scores to the School Committee. New Life also had no religious objection if the parents of children whose scores showed educational difficulties voluntarily consulted with public officials, with the voluntary participation of New Life staff, to determine a remedy to the problem. Pet.App. 10a, 82a.[4]

[4] The court of appeals stated that New Life proposed also voluntarily to submit factual information about the school to the School Committee in con-

5. Prior to trial, the district court heard defendants' motions to dismiss all counts of the complaint. *Braintree Baptist Temple*, 616 F.Supp. at 84. For various reasons, the court dismissed all causes of action raised in the complaint except those arising under the First Amendment for violation of the Free Exercise and Establishment Clauses. *Id.* at 87-92. Among the counts dismissed was one seeking the invalidation of M.G.L. c. 76, § 1, as unconstitutionally vague for failing to set adequate standards for approval of private schools. *Id.* at 91.

After evidentiary hearings, the district court ruled that the School Committee's proposed procedures violated the Free Exercise and Establishment Clauses of the First Amendment. First, it held that M.G.L. c. 76, § 1, was not unconstitutional but that it would consider whether the School Committee's application of the statute was. With respect to the Free Exercise claim, the court applied the traditional four-prong test[5] but held that it was not a balancing test under *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). Thus, the court held it was prohibited from balancing its perception of the weight of the burden on

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junction with its students' taking of standardized tests. That, however, was not part of the proposal of New Life (See Pet.App. 82a), but rather was part of the alternative as envisioned by the district court. See *infra*, page 7.

[5] The relevant factors developed by this Court are:

(1) Whether a plaintiff's free exercise claim is motivated by a sincerely held religious belief. *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 (1972).

(2) Whether, and to what extent, a plaintiff's free exercise of religion has been burdened by government regulation. *Yoder*, 406 U.S. at 217-219; *Sherbert* v. *Verner*, 374 U.S. 398, 403-406 (1963).

(3) Whether the state may justify any limitation on religious liberty by showing that its action is essential to accomplish a compelling or overriding governmental interest. *United States* v. *Lee*, 455 U.S. 252, 257 (1982); *Yoder*, 406 U.S. at 219-234; *Sherbert*, 374 U.S. at 407.

(4) Whether any less intrusive means of achieving the state's compelling interest is available. *Thomas* v. *Review Board of Indiana Employment Security*, 450 U.S. 707, 718 (1981); *Sherbert*, 374 U.S. at 407.

religious belief against its assessment of the importance of the competing state interest or the cost to the School Committee of accommodating such a religious objection through an exception to its generally applicable procedure. Pet.App. 112a-118a.

The court then held that the petitioners' religious beliefs were sincerely held and were burdened by the School Committee's process, and that the state had a compelling interest in "basic education". Pet.App. 118a-138a. The court found, however, that the use of standardized tests was a less restrictive means of achieving that state's interest in education than was the School Committee's approval process. The court proposed an alternative which included (1) "providing" basic information regarding the students, school and curriculum; (2) standardized testing with individual follow-up and (3) possibly, a requirement that teachers have appropriate academic credentials.

With respect to this alternative, the court believed that an academic credentials requirement might be necessary because the expert testimony at trial had shown that standardized tests are "*ex post facto*" in nature — *i.e.* that they show only what a child learned in the past, not whether a school had teaching methods adequate to ensure academic growth in the future. The court nevertheless refused to order that academic credentials should be required. The court also recognized the concern that this procedure fails to reveal where students' knowledge was gained, and thus might mask teaching inadequacies. However, it held these concerns to be irrelevant since the state's interest in education is limited to determining what children know, not what schools teach. It held that the follow-up procedure would be effective because parents would cooperate and the School Committee could, absent cooperation, bring civil care and protection proceedings to compel education at an approved school or, possibly, remove children from their parents' care. Pet.App. 99a-100a, 139a-146a.

Finally, the court held that the School Committee's approval process violated the Establishment Clause because it engendered excessive entanglement between the state and religion through continuing surveillance of a religious institution as part of a regulatory scheme. In contrast, the court held that the alternatives it suggested would not violate the Establishment clause, either by favoring religion or by engendering excessive contacts between the government and a religious organization. Pet.App. 147a-166a.

As a result, the court issued an order permanently enjoining the School Committee from applying its approval process to petitioners and from prosecuting the parent petitioners for failure to send their children to an approved private school or a public school. Pet.App. 168a-169a. This order was later converted to a final judgment and certified for appeal. 170a-178a.

6. The court of appeals reversed. In doing so, it reviewed the whole record, and recognized that in First Amendment cases it must employ *de novo* review to questions of "constitutional fact".[6] Pet. App. 4a-5a. On the Free Exercise claim, the court also applied the traditional four-pronged test (see *supra*, page 6 n.5), and considered two questions — (i) whether the Free Exercise Clause forbade the School Committee from approving secular education offered at a religious school over a religious objection to such approval, and (ii) if not, whether the Free Exercise Clause forbade the School Committee from following its proposed approval procedures rather than the standardized testing procedures preferred by New Life. Pet.App. 12a-13a.

As to the first question, the court found that the School Committee may enforce the state law requiring direct approval of New Life's secular education program. It recognized New

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[6] Citing *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 54 (1971); *Miller* v. *Fenton*, 474 U.S. 104, 113-115 (1985); *Bose Corporation* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984).

Life's sincere religious belief and that the approval requirement contained in state law burdened that belief. It also found that the state's interest in ensuring that children receive an adequate secular education is compelling, and that there was no way that interest could be served except through some form of state evaluation and approval. The court noted that such approval standards must be reasonable, but that, since they have not yet been presented or applied (other than those contained in the statute), there was no reason to believe they would not be constitutionally permissible. Pet.App. 13a-18a.

As to the second question, the court reached the fourth prong of the Free Exercise test — whether standardized testing constituted a "less restrictive" means of achieving the state's compelling goals. It noted that "least restrictive means" analysis is not self-defining. It must reflect the need to "balance" the state's interests against the probable burdens on religious freedom, the need to determine the extent to which accomodation of religious belief interferes with achieving the state's compelling interest, and the administrative considerations which arise from such accommodation, noting that the Free Exercise Clause gives the state some degree of administrative leeway.[7] Pet.App. 19a-24a.

Based on these considerations, the court found that the First Amendment does not preclude the School Committee from using its approval process, nor compel the use of the standardized testing method proposed by New Life and the district court. The court considered the numerous educational difficulties which arose from the voluntary nature of the standardized testing system considered by the district court, as well as the problems which the remedial "follow-up" with individual children would create under the Establishment Clause. Pet.App.

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[7] Citing *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988); *Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961); *United States* v. *Lee*, 455 U.S. 252, 260-261 (1982).

26a-28a. The court raised numerous questions, suggested by the record, as to the efficacy of standardized testing to indicate academic progress. However, it did not view those questions as dispositive, but rather as indications of the types of obstacles and the significant additional administrative problems which such a system would impose upon the School Committee. Pet.App. 28a-32a.

The court considered the comparative religious burdens of the standardized testing method on New Life and concluded they were great, since New Life would be involved annually in the School Committee's approval of the tests to be given, and in negotiations with the School Committee over interpretation of the tests and the appropriate follow-up or remedial procedures. The burdens on the parents and students of New Life, the court concluded, would be even greater, since they risked enforced remedial or alternative schooling obligations or criminal and civil enforcement proceedings to remove children from their families. Even paying heed to New Life's preference for the procedure, the court concluded that it was not significantly less burdensome than the School Committee's proposed procedure. Pet.App. 31a-35a.

Finally, the court held that the weight of legal precedent was strongly against New Life's position, since numerous court's had considered and rejected religious objections to school approval and religious preferences for standardized testing in similar circumstances. Pet.App. 35a-37a. The court distinguished the instant case from *Yoder*, *supra*, and from cases involving pervasive and all-encompassing school regulations. Pet.App. 37a-40a.

With respect to the Establishment Clause, the court reviewed New Life's claim that the School Committee's review of teacher credentials would create excessive government entanglement with religion. The court considered the district court's findings on how such review would take place — *i.e.* with

one initial visit and additional visits only if teaching credentials are inadequate. Since New Life has no religious objection to hiring qualified teachers, and the district court found such teachers were available, the court held such additional visits might not take place. The court assumed that the School Committee would implement these proposed procedures reasonably, and noted that state law prohibited School Committee officials from considering religious matters in any school observation. Thus, the court held that, under this Court's cases on Establishment entanglement, the proposed visits were not impermissible since they did not implicate the provision of services to a religious school, did not seek to exercise control of religious matters, and were not unduly intrusive. Pet.App. 42a-47a. The court noted that, if not reasonably applied, the School Committee's procedures could become unduly entangling. But since additional visits were proposed only as an accommodation to New Life, if teachers lack credentials, to determine whether they nevertheless could teach adequately, the court found no precedent for holding such additional visits as proposed to be in violation of the Establishment Clause.

Argument.

The decision of the court of appeals is correct and does not conflict with any decisions of this Court or any other court. Review by this Court therefore is not warranted.

1. There is no need, as petitioners claim (Pet. 14-22), for this Court to clarify the application of its Free Exercise standard to cases involving the manner of state regulation of education in religious schools. Petitioners assert (Pet. 19-21) that the lower courts are in confusion regarding the proper application of the standard. They claim the court of appeals (at Pet.App.

16a-17a), unlike the district court, wrongly eschewed the Court's Free Exercise cases in favor of the line of cases following *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925),[8] which set forth the state's right to regulate private school education. Petitioners are incorrect.

This Court's four-pronged Free Exercise standard was announced and developed in a series of cases. See *supra*, page 6 n.5. The court of appeals specifically adopted and applied that standard to both Free Exercise questions presented by petitioners — whether New Life's objection to approval *per se* may stand and whether its preference for standardized testing is constitutionally mandated. Pet.App. 12a-26a. The only dispute which arose between the district court and the court of appeals regarding the proper scope of the Court's Free Exercise standard was whether the Court has required or prohibited the use of a balancing test to apply the factors contained in that standard.

On this point, the court of appeals, which adopted a balancing approach, was clearly correct. As the court pointed out (Pet.App. 20a-21a), this Court has consistently used a balancing of interests approach in Free Exercise cases.[9] The lower courts have done the same.[10] In contrast, the district court

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[8] *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). See also *Committee for Public Education and Religiouis Liberty* v. *Regan*, 444 U.S. 646, 653-654 (1980); *Wolman* v. *Walter*, 433 U.S. 229, 240 (1977) (in reasonably regulating schools, states "may examine both teachers and pupils. . . .").

[9] *Texas Monthly, Inc.* v. *Bullock*, U.S. , 109 S.Ct. 890, 902 (1989); *Bob Jones University* v. *United States*, 461 U.S. 574, 603-604, and n.29 (1983); *Lee*, 455 U.S. at 256-260; *Thomas*, 450 U.S. at 718; *McDaniel* v. *Paty*, 435 U.S. 618, 628, n.8 (1978); *Yoder*, 406 U.S. at 214, 215, 221; *Sherbert*, 374 U.S. at 403.

[10] *Fellowship Baptist Church* v. *Benton*, 815 F.2d 485, 491 (8th Cir. 1987); *State* v. *Schmidt*, 29 Ohio St.3d 32, 505 N.E.2d 627, 629, *cert. denied* 484 U.S. 942 (1987); *State* v. *Patzer*, 382 N.W.2d 631, 634 (N.D.), *cert. denied* 479 U.S. 825 (1986); *Sheridan Road Baptist Church* v. *Department of Educa-*

misread *Hobbie* v. *Unemployment Appeals Commission*, 480 U.S. 136, 140 (1987), to call for the invalidation of the balancing test by using "strict scrutiny" language. However, the *Hobbie* language was a direct response to *Bowen* v. *Roy*, 476 U.S. 693 (1986), where a minority of the Court substituted a "reasonable means" approach for the compelling state interest prong of the standard balancing test. 476 U.S. at 707-708 (Opinion of Burger, C.J.). The *Hobbie* Court rejected this standard as "minimal scrutiny", and reaffirmed the traditional balancing test. It emphasized however, that the standard required strict scrutiny of the state interests involved. *Hobbie*, 480 U.S 141-142, citing *Yoder*, 406 U.S. at 215. Thus, the Court in *Hobbie* accepted the balancing test, contrary to the district court's claim.

Nor was the court of appeals' reliance on the *Pierce* line of cases (see *supra*, page 12, and n.8) inconsistent with the application of the appropriate Free Exercise standard, as petitioners claim. In fact, the court relied on those cases not in lieu of the Free Exercise standard, but rather to address the state's "compelling interest" as part of that standard. In answer to petitioners' assertion, and the district court's ruling, that a religious objection could block all state approval of education at a religious school, the court correctly held that the *Pierce* cases affirmed the state's overriding interest in its ability reasonably to regulate schools directly. Furthermore, since no way had been suggested to serve this interest without some form of approval, the court ultimately ruled that petitioners' religious objection to approval *per se* must give way. Pet.App. 14a-17a.

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tion, 132 Mich. App. 1, 348 N.W.2d 263, 270 (1984), *aff'd* 426 Mich. 462, 396 N.W.2d 373, 382 (1986), *cert. denied* 481 U.S. 1050 (1987); *Attorney General* v. *Bailey*, 386 Mass. 367, 375, 377, 436 N.E.2d 139 (1982), *cert. denied* 459 U.S. 970 (1982); *State* v. *Rivinius*, 328 N.W.2d 220, 224, 226, 229 (N.D. 1982), *cert. denied* 460 U.S. 1070 (1983); *State* v. *Riddle*, 168 W.Va. 429, 285, S.E.2d 359, 365 (1981); *State* v. *Shaver*, 294 N.W.2d 883, 889-891 (N.D. 1980).

In addition, contrary to petitioners' claim, there is absolutely no confusion or conflict in the lower courts regarding the application of the Free Exercise standard to cases involving the proper extent of state regulation of religious schools. The lower courts have in large numbers and with complete consistency held that state approval of religious school education is permitted in the face of sincere religious objections to such approval, and that the standardized testing approach is not constitutionally required where the government prefers information gathering and analysis.[11] A review of these numerous cases shows that, in virtually all of them, the courts identified and applied the same Free Exercise and balancing standard used by the court of appeals here, and upheld the state regulation involved.

No conflict with this broad body of law was created, as petitioners assert (Pet. 26), by the decision of the Eighth Circuit in *Murphy* v. *Arkansas*, 852 F.2d 1039 (8th Cir. 1988), where the court rejected a challenge to standardized testing required by Arkansas legislation permitting home schooling.[12] The fact that *Murphy* found standardized testing to be within the constitutionally acceptable range does not, of course, mean that it limited that range. Indeed, the court there approved standardized testing because it was the *only* safeguard the state had chosen to ensure adequate private education. It compared that choice to other states where greater safeguards, such as teacher

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[11] The court of appeals collected and categorized the long list of decided cases addressing these issues at Pet.App. 35a-37a. In addition to those cases, courts have also rejected religious objections to regulations or prohibitions on private schools or home education in *North Valley Baptist Church* v. *McMahon*, 696 F.Supp. 518 (E.D. Cal. 1988); *Mazanec* v. *North Judson-San Pierre School Corporation*, 614 F.Supp. 1152 (N.D.Ind. 1985), *aff'd*, 798 F.2d 230 (7th Cir. 1986); *Howell* v. *State*, 723 S.W.2d 755 (Tex.App. 1986); *State ex rel. Minami* v. *Andrews*, 65 Haw. 289, 651 P.2d 473 (1982).

[12] Arkansas had formerly constitutionally banned all home schooling. *Burrow* v. *State*, 282 Ark. 479, 669 S.W.2d 441 (1984).

certification and curriculum requirements, had been approved as constitutional. 852 F.2d at 1042-1043.

In the face of this consistent approach of the lower courts, as petitioners concede (Pet. 15, n. 17), this Court has always denied review.[13] Similarly, nothing in the court of appeals' approach here to the Free Exercise standard warrants review.

2. Petitioners next attempt to retrench their position by claiming (Pet. 22) that they do not object to all forms of approval, and have conceded that some form of approval is necessary. Thus, petitioners take this opportunity to claim (Pet. 23-28) that the School Committee's process is insufficient because it involves a discretionary procedure, rather than an objective standard, for approval.

However, this is not the claim which petitioners presented to either the district court or the court of appeals. On the contrary, it was petitioners' specific position, as both the district court and court of appeals found, that they had no religious objection at all to the substance of the requirements proposed by the School Committee, but instead held a strictly *per se* objection to the School Committee's approval or disapproval of the school's program itself. See *supra*, page 5.

Likewise, petitioners have never before raised, and neither the district court nor the court of appeals addressed, the claim that the School Committee's procedures are faulty because they lack objective standards. In any event, it is the Commonwealth's compulsory education statute (M.G.L. c. 76, § 1) which sets forth the standards for approval of private school education. Indeed, in the Commonwealth, the setting of such educational standards is a function reserved for the Legislature. See *Care and Protection of Charles*, 399 Mass. at 332. Thus,

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[13] Petitioners' list of cases in which certiorari was denied or appeals were dismissed for want of a substantial federal question (Pet. 15, n.7) fails to include *People* v. *Turner*, 121 Cal.App.2d Supp. 861, 263 P.2d 685 (1953), *dismissed for want of a substantial federal question*, 3247 U.S. 972 (1954).

the fact that the School Committee's requirements constitute "process" rather than standards is precisely because they are intended to be the School Committee's method for determining whether the objective standards of the statute are met. *Id.*

In this regard, it is the law of this case that the statututory standards for approval are sufficiently objective to be constitutional. The district court here so held in ruling on defendants' motion to dismiss below, and that ruling was not appealed. *Braintree Baptist Church*, 616 F.Supp. at 91. In addition, the state Supreme Judicial Court has reviewed and rejected the claim that the standards set forth in the statute are unconstitutionally vague for failure to provide objective standards or constitute an illegal delegation of authority to the school committees. *Care and Protection of Charles*, *supra*.

In *Charles*, after reviewing the statutory standards set forth in M.G.L. c. 71, §§ 1, 2, and 3, and the approval standards set forth in M.G.L. c. 76, § 1 (see *supra*, page 2), the Supreme Judicial Court held that this "body of substantive law . . . provides the superintendents and school committees of the Commonwealth with sufficient standards . . ." (*Id.* at 331) and " 'does not impermissibly delegate basic policy matters . . . for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.' " *Id.* at 332, citing *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499; *reh'g denied*, 456 U.S. 950 (1982). Nor, since the statute specifically forbids the school committee from withholding approval of private schools "on account of religious teaching . . ." are any constitutionally protected rights implicated, a factor this Court has indicated is the most important in determining a statute's constitutionality in this area. *Hoffman Estates*, 455 U.S. at 499. *Care and Protection of Charles*, 399 Mass. at 331-332.[14]

[14] The court also set forth further guidelines "which provide particulars through which the reasonableness" of approval may be measured. *Id.* at 333.

Thus, the court of appeals here made no error in failing to to invalidate the School Committee's procedures as unduly discretionary. Not only was the issue not raised, the School Committee's procedures are strictly governed by the objective standards for approval set forth in the statute and the guidelines set forth by the Supreme Judicial Court, and thus are not unconstitutionally subjective.[15]

3. Petitioners next fault the adequacy of the court of appeals' review under the Establishment Clause, asserting (Pet. 28-30), that the court distinguished this Court's establishment cases and failed to recognize that the cases aim not only at protecting government from too much control by the church, but also at protecting the church from too much interference by the the government. This characterization is completely wrong.

In fact, the court of appeals made extensive analysis of whether the School Committee's procedures would result in burdensome or entangling contacts against which petitioners should be protected, relying on this Court's Establishment cases prohibiting such contacts.[16] Pet.App. 42a-43a, 45a-50a.

In addition to clarifying the approval standards, the court there noted that school committees should provide written statements of reasons on disapproval and the opportunity for an informal hearing.

Thus, this case is hardly "on all fours" with *Hague* v. *Committee For Industrial Organization*, 307 U.S. 496 (1939) (Pet. 26-27), which involved a town ordinance found to have no objective standards and which reached constitutionally protected acts, the rights of free speech and assembly. *Id.* at 501, 501, n.1, 516.

[15] New Life's related claim (Pet. 23, 24-25) that the School Committee's procedure is to be faulted because it is not yet final is likewise wrong. The record of this case shows that, prior to this litigation, the School Committee was attempting to shape a procedure which would serve its interests while not offending religious schools espousing Fundamentalist doctrine. See *supra*, page 3, Pet.App. 70a, 74a. The only reason that the procedure remains a "proposal" at this stage is that these negotiations ended when this suit was initiated, and the district court subsequently entered an injunction prohibiting further use of the procedure. See *supra*, page 8.

[16] *Aguilar* v. *Felton*, 473 U.S. 402, 413 (1985); *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 765 (1976); *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971); *Wolman*, 433 U.S. at 241-244; *Meek* v. *Pittenger*, 421 U.S.

4. Finally, petitioners claim (Pet. 30-34) that this Court's review is necessary because the court of appeals overstepped the bounds of its appellate role in reviewing the facts of this case. Petitioners do not dispute that *de novo* review was warranted in this First Amendment case under *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), and *Bose Corporation* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), as the court of appeals held. Instead it asserts, without citation, that the appellate courts may make *de novo* review only of "ultimate constitutional facts" [17], but in reviewing "predicate facts" is bound by the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure.

Appellate courts are not limited in the manner suggested by petitioners. Rather, this Court has held that, in First Amendment cases, appellate courts must make an independent examination of the whole record.[18] Of course, *de novo* consideration may only be given to those facts with direct bearing on an ultimate constitutional question; that is, they must be those "special facts which have been deemed of constitutional significance." *Bose Corporation*, 466 U.S. at 505. As this Court later noted in *Miller* v. *Fenton*, 474 U.S. 104, 114-115 (1985), the fact/law relationship in the First Amendment area is critical. For this reason:

> [w]here, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal

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349, 369-372 (1975); *Tilton* v. *Richardson*, 403 U.S. 672, 687-688, *reh'g denied*, 404 U.S. 874 (1971).

[17] Petitioners suggest these would include only such questions as "Is a person a 'public figure' in a defamation case?; or, Does the state have a 'compelling interest' in a free exercise case?" Pet. 32.

[18] *Bose Corporation*, 466 U.S. at 499, 508; *New York Times Company* v. *Sullivan*, 376 U.S. 254, 284-286 (1964); *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963). See also *Harte-Hanks Communications, Inc.* v. *Connaughton*, U.S. , 109 S.Ct. 2678 (1989); *Rankin* v. *McPherson*, 483 U.S. 378, *reh'g denied*, 483 U.S. 1056 (1987).

> principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law.

474 U.S. at 114. Citing *Bose Corporation*, 466 U.S. at 503.[19]

Petitioners mention two major areas where they believe the court of appeals improperly re-decided facts -- (i) the educational viability of standardized testing to measure academic progress (Pet. 31,33), and (ii) the number of visits proposed by the School Committee to observe the school (Pet. 31).[20] Each of these areas are unquestionably within the bounds of "special facts" of constitutional significance. The standardized testing issues, considered by the court of appeals at Pet.App. 28a-30a, bear directly on the constitutional question of whether standardized testing constitutes a "less restrictive alternative" which would fulfill the state's compelling interest in education. See *Thomas*, 450 U.S. at 718; *Sherbert*, 374 U.S. at 417. See

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[19] *Maine* v. *Taylor*, 477 U.S. 131 (1986), cited by petitioners (Pet. 34) is inapplicable, since it was a criminal case involving a Commerce Clause issue. The court there noted that the "clearly erroneous" standard has always been applied in such cases. 477 U.S. 145.

[20] Petitioners also mention (Pet. 32-33) the court of appeals' treatment of the academic component of education at the school as "secular", even though, they assert, the parties stipulated that the school's program was thoroughly religious in all areas. What the stipulation actually says (Pet. 6) is that petitioners "believe" their "education ministry" is scripturally based. This stipulation of belief, of course, goes only to whether petitioners hold a sincere religious belief which would be violated by complying with the School Committee's regulations, something the court of appaels accepted without question. Pet. App. 14a. The stipulation does not define whether, for purposes of constitutional law, petitioners carry on secular activities subject to government regulation. In this realm, the fact that petitioners may see their school program as a religious rather than secular activity is irrelevant. *Bowen*, 476 U.S. at 701, n.6.

also Pet.App. at 26a. Likewise, the nature of the visits contemplated by the School Committee's procedure is directly related to the constitutional question under the Establishment Clause of whether the procedure will "foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-613.

Furthermore, as with the fact/law distinction generally in First Amendment cases, what petitioners call factual conflicts can actually be categorized as differing legal judgments.[21] For instance, on the issue of standardized testing, the district court itself recognized concerns that standardized testing showed only what children had learned in the past (and thus was *ex post facto* in nature), and not where they had gained that knowledge or whether the school they attended had the skills to ensure continued academic progress. However, it made the legal judgment that, despite these concerns, the state's compelling interest could be adequately served if a teacher credential requirement were also imposed (something it ultimately failed to order). Likewise, it ruled that the state's interest was limited to ensuring that children learned, not that schools taught. Pet.App. 99a, 143a-144a.

The court of appeals, in addressing this issue, did not make specific findings but rather articulated the numerous concerns which the record suggested regarding the difficulties of utilizing a voluntary standardized testing procedure and the educational questions which arise about standardized testing results. These questions and concerns are similar to, albeit more extensively considered then, those recognized by the district court. The court of appeals did not even treat the questions raised as

[21] Indeed, so close was the fact/law relationship in this case that the district court made virtually identical findings regarding standardized testing and school visits, among other things, in both its Findings of Facts and Conclusions of Law. This in itself is an ample demonstration of why *Miller* held that appellate courts must not be bound by the presumptive force of factual findings by the trial court in First Amendment cases.

dispositive. It simply made the differing legal judgment that the very existence of those standardized testing issues ill-served the state's compelling interest because of the obstacles and administrative difficulties which resolving such questions would impose. Pet.App. 26a-32a.[22]

This was also the case with the issue of visits by the School Committee. Both courts held that the School Committee proposed one or more occasional visits to the school and that additional visits might be necessary, in lieu of disapproval, to accommodate the school if its teachers lacked credentials. See *supra*, pages 3-4. The court of appeals simply made a different legal judgment than did the district court, finding that no excessive entanglement would result.[23]

Finally, *Bose* points out that Rule 52(a) itself does not prohibit appellate courts from reviewing the whole record and in fact permits them to correct "a finding of fact that is predicated on a misunderstanding of the governing rule of law." 466 U.S. at 501. The district court here refused either to employ a balancing test in considering the state's compelling interest or to consider in any way the administrative burden which would

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[22] Petitioners also accuse (Pet. 33) the court of appeals of substituting its own opinion regarding education practices. Petitioners' assertion that the court of appeals concocted evidence is without basis. As the district court's somewhat truncated summary (Pet.App. 83a-94a) of the voluminous expert testimony in the case shows, there was plenty of opinion presented on both sides of this issue. Without burdening the Court with a detailed review of the record, it seems clear even from the district court summary that the court of appeals' questions about standardized testing find adequate basis in the record.

[23] The court of appeals recognized the district court's concern that such visits could be abused by the School Committee, but chose instead to assume that the procedure would be reasonably carried out. This it was bound to do under this Court's prohibition that courts not make constitutional determinations based on speculative or hypothetical threats. See *Laird* v. *Tatum*, 408 U.S. 1, 13-15, *reh'g denied*, 409 U.S. 901 (1972), 479 U.S. 911 (1986); *International Longshoremen's and Warehousemen's Union* v. *Boyd*, 347 U.S. 222, 224 (1954); *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89-90 (1947).

be created by the use of petitioners' standardized testing alternative. See *supra*, pages 6-7. The court of appeals, in contrast, properly considered these factors (see *supra*, page 9). Thus, any new findings it made regarding the relative burdens of standardized testing were necessitated, and correctly so under Rule 52(a), by the district court's failure to apply the correct legal standard. In any case, in all areas mentioned in the Petition, the court of appeals stayed well within the area of review permitted by this Court.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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